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DOCKET NUMBER:

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1988

IN RE:
BULLION RESERVE OF NORTH
AMERICA, A California Corporation,
Debtors.

THEODORE P. BOZEK,
Appellant,

Against

CURTIS B. DANNING, CHAPTER 7 TRUSTEE,
Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CASE NUMBER 86-6649

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit erred in finding that a preference exists under 11 U.S.C. Section 547, where appellant received such transfer as the beneficiary of an express trust.
2. Whether a preference exists where appellant purchased precious metals from debtor prior to the preference period, stored them with debtor, and took custody of the metals during the preference period.
3. Whether, in the alternative, if a preference is found to exist, whether the court of appeals erred in concluding that neither the contemporaneous exchange defense nor the ordinary course of business defense apply where debtor

converted precious metals it held in storage for appellant.

LIST OF PARTIES

Curtis B. Danning is the bankruptcy Trustee appointed to administer the estate of Bullion Reserve of North America. As Trustee, Mr. Danning, Plaintiff, initiated this preference action against Defendant, Theodore P. Bozek, petitioner herein.

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Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Theodore P. Bozek, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed January 11, 1988.

OPINION BELOW

The judgment of the United States Bankruptcy Court (Central District - Los Angeles) is unreported and appears in the Appendix attached hereto. The judgment of the United States District court for the Central District of California is also unreported and appears in the Appendix attached hereto.

The Opinion of the United States Court of Appeals for the Ninth Circuit is found at 836 F.2d 1214.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on January 11, 1988. This petition for certiorari is filed within 90 days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the following statutes relevant to the determination of the present case are set forth in the Appendices: 11 U.S.C. Section 547, 11 U.S.C. Sections 101(4), 101(9), and 101(11) of the Bankruptcy Code; Rule 301 of the Federal Rules of Evidence; California Civil Code Sections 2221, 2222, 2236, 2289; and California Probate Code Sections 15600, and 15660.

STATEMENT OF CASE

Defendant, THEODORE P. BOZEK, is one of many Defendants in actions filed by the Chapter 7 Trustee, Curtis B. Danning, to avoid and recover allegedly preferential transfers made from Bullion Reserve of North America, a California Corporation (hereinafter "BRNA") to its member account holders during the statutory 90 day

preference period. 11 U.S.C. Section 547.

In its brochure entitled "Bullion Reserve of North America Introduces the Member Account Program," (See brochure in Appendix) BRNA offered, in exchange for a commission, to buy and sell precious metals for their members. Customers, such as THEODORE P. BOZEK, would communicate to BRNA specific orders for purchases or sales of designated amounts of precious metals. BRNA would then purchase and sell precious metals at prices fixed on the floor of the New York Commodity Exchange or by Johnson Matthey, Ltd., in London. The purchases and sales would be made in the customers' names. Most importantly, the metals would be delivered to customers or, at the customer's option, placed under the Trusteeship of BRNA's wholly owned subsidiary, Intermountain Depository Inc. (I.D.C.), and stored at Perpetual Storage Inc. (P.S.I.), segregated from BRNA'S

own bullion deposits. Storage at P.S.I. was included in the purchase price of the bullion.

Appellant THEODORE P. BOZEK, made purchases of bullion on December 22, 1981, March 19, 1982, June 6, 1981, and June 14, 1982. Patrick Lynch, President of P.S.I., assured Theodore Bozek that his bullion was in segregated storage containers at P.S.I.'s maximum security vault facility in the side of a granite mountain in Utah.

Mr. Bozek's dealings with BRNA were ordinary purchase-sale transactions for tangible commodities made during the ordinary course of business. Theodore was never an investor in or creditor of BRNA. Mr. Bozek never received a prospectus of purchased securities from BRNA. He never received dividends or interest of any kind from BRNA or any of its affiliated entities. He was not privy to any fraud or Ponzi-type scheme

perpetrated by BRNA. Every investment decision on Mr. Bozek's account was made at Mr. Bozek's direction.

Unknown to Mr. Bozek, BRNA and its wholly owned subsidiary I.D.C. co-mingled the assets of its customers with its own assets. BRNA used these assets to invest in the commodity futures market and to purchase metals to cover customer requests to deliver metals.

In August of 1983, Mr. Bozek asked that his metals be delivered to a separate account at P.S.I. and Mr. Bozek began payment of storage fees to P.S.I. on a regular basis. In September, 1984, Mr. Bozek decided to retrieve substantially all of his bullion from P.S.I.

On October 3, 1983, BRNA filed for relief under Chapter 11 of the Bankruptcy Code. The Bankruptcy Court converted this proceeding into a Chapter 7 liquidation

proceeding on January 10, 1984.

On August 9, 1984, the Trustee filed the instant action against Mr. Bozek alleging that the metals delivered to his separate account at P.S.I. and later retrieved from that location constituted an avoidable preference.

In November and December 1985, Mr. Bozek and the Trustee each filed Motions for Summary Judgment. At the hearing of the motions on January 24, 1986, the Honorable Judge Barry Russell of the U.S. Bankruptcy Court (C.D.California) held in favor of the Trustee (See Appendix) No oral argument was permitted. Judgment was entered for the trustee in the amount of $212,138.60, together with interest thereon from the date the Complaint was served.

Mr. Bozek appealed to the U.S. District Court, Central District of California which affirmed the Bankruptcy Court's entry of

summary judgment. (See Appendix)

Mr. Bozek next appealed to the U.S. Court of Appeals for the Ninth Circuit, which also affirmed in a published opinion. See In Re Bullion Reserve of North America, Danning v. Bozek 836 F 2d 1214.

Defendant seeks reversal of the summary judgment below and directions for entry of summary judgment against the Trustee. Alternatively, Defendant seeks reversal of the Trustee's summary judgment so that triable issues of fact remaining may be resolved at trial.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT COURT ERRED IN APPLYING A PRESUMPTION THAT THE PROPERTY WITHDRAWN BY MR. BOZEK WAS THE PROPERTY OF DEBTOR

The elements of an avoidable preference under Section 547(b) consist of the following:

(1) a transfer of the Debtor's property;

(2) to or for the benefit of a creditor;

(3) for or on account of an antecedent debt;

(4) made while the Debtor was insolvent;

(5) made or written 90 days before the date of the filing of the bankruptcy petition; and

(6) which enables the favored creditor

to receive more than he would have received in Chapter 7 liquidation proceedings.

11 U.S.C. Section 547(b)

To avoid a prepetition transfer as preferential, Trustee has the burden of proving all of these elements. Kallen v. Litas (1985, NDILL) 47 BR 977, 13 CBC 2d 289; In re American Ambulance Service, Inc. (1985, BC SDCAL) 46 BR 658, 12 BCD 1033, 12 CBC 2d 396; In re Olympic Foundry Co. (1985, BCWD Wash.) 51 BR 428; Matter of Kennesaw Mint, Inc. 32 BR 799, 802 (Bkrtcy. SDNY 1981).

The court must examine each element of a preference to determine if the Trustee has met his burden of proof in a Summary Judgment proceeding. (In re Independent Clearing House, 41 BR 985, 1010 (Bkrtcy D. Utah 1984))

The opinion below circumvents two of the requisite elements of a preference by creating a presumption that relieves the

trustee of his burden of proof with respect to the first and third of the above listed elements. The opinion states:

> "Generally, property belongs to the debtor for purposes of Section 547 if its transfer will deprive the bankruptcy estate of something which could otherwise be used to satisfy the claims of creditors."
>
> . . .
>
> Because this money could have been used to pay other creditors, it presumptively constitutes property of the debtor's estate.

To support this bold assertion the Court cites Coral Petroleum, Inc. v. Banque Paribas-London, 797 F. 2d 1351, 1355-56 (5th Cir 1986) and Henderson v. Alred (In re Western World Funding, Inc.) 54 B.R. 470, 475 (Bankr. D. Nev. 1985). These cases do not support the Court of Appeals position that such a presumption exists.

In Coral Petroleum the 5th Circuit Court

of Appeals stated:

> "For a preference to be voided under Section 547, it is essential that the debtor have an interest in the property so that the estate is thereby diminished (emphasis added; citations omitted)

The above language does not imply a presumption that any transfer that diminishes the estate becomes the property of the debtor. This language emphasizes the "essential" requirement that the debtor have an interest in the property alleged to be a preference. Coral at 1355-1356, 11 U.S.C. Section 547(b).

In Re Western World Funding, supra, at 475, involves a preference action where the Bankruptcy Court there held that checks drawn on the accounts of the debtor constituted prima facie proof that these defendants received transfers of the debtors property. That case does not create a presumption in

favor of debtor's ownership whenever a transfer would deplete the estate but only hold that the checks in that case constitute evidence that these transfers were property of the debtor.

Furthermore, Rule 301 of the Federal Rules of Evidence, provides:

> In all civil actions and proceedings not otherwise provided for by act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. (Emphasis added).

In the case at bar, Mr. Bozek submitted evidence to rebut this presumption. This evidence at minimum establishes a material issue of fact as to whether the property transferred was the corpus of an express

trust. (See brochure, in Appendix)

Thus, the presumption created by the Ninth Circuit in the opinion below circumvents the requirement that the movant establish that no genuine issues of material fact remain in order to grant a motion for summary judgment. Rule 56(c) F.R.C.P. Coleman v. Darden 595 F. 2d 533 (10th Cir) Cert. den 444 U.S. 927 (1979). Furthermore, this presumption also relieves the Trustee from his burden of proving that the property transferred was the property of the debtor. 11 U.S.C. Section 547(b). Grover v. Gulino (In Re Gulino), 779, F 2d 546, 549 (9th Cir 1985).

II.

THE NINTH CIRCUIT COURT ERRED IN MAKING FINDINGS OF FACT THAT BRNA NEVER INTENDED TO ASSUME THE DUTIES OF A TRUSTEE.

Payments made to the beneficiary of an express trust are not preferences under 11 U.S.C. Section 547; Selby v. Ford Motor Company, 590 F2d 642, 644 (6th Cir.1979); In Re Casco Electric Corporation 28 BR 191, 193 (Bkrtcy. EDNY 1983) aff'd 35 BR 731 (EDNY 1983); In Re Property Leasing & Magmt.Co., 50 B.R. 804 (ED Tenn. 1985).

The existence of such a trust is a matter of state law. Matter of Esgro, Inc. 645 F2d. 794, 797 (9th Cir.1981).

In the opinion below, the Court of Appeals makes several inconsistent statements that cannot be reconciled with its duty to reverse where genuine issues of material fact

remain to be tried. F.R.C.P. Rule 56(c); Coleman v. Darden 595 F. 2d 533 (10th Cir) Cert.den. 444 U.S. 927 (1979).

The Court of Appeals first states in its statement of facts:

> BRNA also represented that the stored bullion would be under the trusteeship of the Intermountain Depository Corporation, its wholly owned subsidiary.

However, later in the opinion the Court states:

> There is no indication that BRNA intended to assume the duties of a trustee. (citation) The member account program brochure specified that the Intermountain Depository Corporation would be a trustee for participants' bullion stored at Perpetual Storage Incorporated. BRNA never stated it would be a trustee of the funds it received from program participants. (footnote omitted).

One must emphasize that BRNA did state

that it would be trustee of the funds it received from program participants through its wholly owned subsidiary, Intermountain Depository Corporation. See BRNA Brochure in Appendix.

Furthermore, Intermountain Depository Corporation is a wholly owned subsidiary of BRNA which has also filed for bankruptcy in an action consolidated with the Bankruptcy of BRNA.

The Court of Appeals also misinterprets Civil Code Section 2222. This code section defines when a trustee will be liable for surcharge as a fiduciary for improper administration of the trust. It does not govern whether or not a trust is valid. See California Civil Code, Section 2289 (repealed operative July 1, 1987, now Probate Code, Section 15660). Such a strained interpretation of California Civil Code, Section 2222 violates the basic rule of law

that a trust will not be allowed to fail for want of a trustee. Shaw v. Johnson (1936) 15 Cal.App.2d 599, 59 P.2d 876, 878-879, Restatement 2d Trusts, Section 35. California Civil Code, Section 2222 must be read together with Section 2289. Furthermore, a trustee who does not accept his duties under Section 2222 cannot thereby take title to the trust corpus. Civil Code, Section 2236. See also Wickman v. United American Bank, (In Re Property Leasing & Management Co.; 50 BR 804, 809 (Bkrtcy E.D. Tenn.1985).

Thus, failure of a trustee to accept a trust under Civil Code Section 2222, does not invalidate the trust. Civil Code Section 2289.

III.

THE NINTH CIRCUIT ERRED IN PLACING THE BURDEN OF TRACING TRUST ASSETS ON APPELLANT

The Ninth Circuit, in the opinion below, requires Appellant, Mr. Bozek, to trace the metals he received to the purchases he made in order to establish them as part of the trust corpus. The Court below applies this rule without any citation to authority to support the existence of such a rule. The Court only stated in a footnote that California Trust Law is not to the contrary and cited a clearly distinguishable 1942 case. Bozek, supra at fn. 5; Kobida v. Hinklemann 53 Cal.App.2d 186, 195, 127 P.2d 657 (1942).

As discussed in Part I, supra, 11 U.S.C. Section 547(b) places the burden of proof squarely on the Trustee to establish that the

property transferred is property of the debtor. The Ninth Circuit's new requirement of tracing trust assets contravenes this burden as established under Section 547.

IV.

THE NINTH CIRCUIT ERRED IN EXPANDING THE DEFINITIONS "CREDITOR" AND "CLAIM" BEYOND THAT INTENDED BY CONGRESS OR SUPPORTED BY THE AUTHORITIES.

In the case at bar, Mr. Bozek's business with BRNA consisted of two separate sets of transactions. Appellant purchased his metals from BRNA and Appellant stored his metals pursuant to the express trust. As Mr. Bozek had already purchased the metals and taken delivery through the trust, he cannot be said to have a claim against the debtor. BRNA had fully performed both contracts as to Mr. Bozek. Thus, no debt was ever created under a breach of contract theory.

The existence of a claim turns on when it arose. In Re UNR Industries, Inc.,29 B.R. 741, 745 (N.D. Ill. 1983) Appeal dismissed 745 F2d. 1111 (1984). In a cause of action, for obtaining money by false misrepresentations, the wrongful act itself does not create the claim; the resulting injury creates the claim. 29 B.R. at 745. Without such a claim, there could be no transfer on account of an antecedent debt because no debt to Appellant ever arose. The demand was satisfied and he suffered no injury.

The Court below rejects this argument by relying on the "broad definitions" of "claim" and "debt" under the Bankruptcy Code. While the definitions of these terms are broad, this fact alone cannot justify expanding the definitions of these terms beyond their logical limits, nor beyond the limits imposed by Congress. Ohio v. Kovaks 469 U.S. 274,

279; 105 S.Ct. 705, 709 (1985). Here, the definitions of "claim" and "debt" do not include Mr. Bozek's precious metals. Mr. Bozek purchased the metals months in advance of the preference period. Mr. Bozek did not have a "claim" or "debt" owed to him, he had title to precious metals stored in P.S.I.'s facility which were later delivered to his separate P.S.I. account during the preference period. The only change of legal significance is that Mr. Bozek now had full custody of his metals.

The Court's citation to Grover v. Gulino (In Re Gulino), 779 F.2d 546, 551-552 (9th Circuit 1985) does not support this expansion of the definition of "debt" or "claim". In Gulino the debtors conveyed a house to their son, who took immediate possession, but failed to record the deed until seventeen days prior to the date the grantor filed for bankruptcy. The Court held that the

conveyance of the house was not a preference. The Court defined a debt as antecedent if "the transfer is effectively delayed beyond an inconsequential period". Gulina at 552. Here, while custody remained with BRNA's subsidiary I.D.C., at the P.S.I. facility, the transfer occurred contemporaneously with the purchase of the metals.

V.

THE COURT BELOW ERRED IN HOLDING THAT MR. BOZEK HAD THE BURDEN TO PROVE EXCEPTIONS UNDER SECTION 547(C) ON SUMMARY JUDGMENT

In the event the Court holds that a preference exists, appellant submits that two exceptions to preference liability apply here: The contemporaneous exchange defense, 11 U.S.C. Section 547(c)(1) and the ordinary course of business defense. Citing American Ambulance Service, Inc., 46 B.R. 658, 660

(Bankr.S.D.Cal.1985). The Court below held that Mr. Bozek has the burden of proving the bullion transfer is excepted from the trustee's avoidance power.

Bozek, supra, 836 F.2d 1214.

The Court below assigns the burden of proof to the wrong party. First of all, American Ambulance assigns a burden of production on the preference defendant to show that a transfer falls within an exception under Section 547(c). American Ambulance at 660, 661. That case explained that once a preference defendant has shown facts sufficient to support a finding in favor of one of the exceptions in Section 547(c) that the burden of proof shifts back to the Trustee. American Ambulance at 661.

Secondly, American Ambulance was not a preference action on summary judgment. In American Ambulance the creditor made a motion to direct the trustee to turn over property

to the creditor. The Trustee sought to invoke his avoidance power as a defense to this rather unusual motion. See American Ambulance at 659.

By contrast, the case at bar is here on summary judgment brought by the Trustee. All inferences of fact must be taken as alleged by the non-moving party. Coke v. General Adjustment Bureau 640 F.2d 584 (5th Cir.. 1981).

VI.

THE "PONZI SCHEME" EXCEPTION DOES NOT APPLY TO THE CASE AT BAR

The Court below holds that the ordinary course of business exception at 11 U.S.C. Section 547(c)(2) cannot apply when the transfers were made in a "Ponzi Scheme." A Ponzi Scheme is an arrangement where the debtor uses later acquired funds to pay off

previous investors. See Cunningham v. Brown 265 U.S. 1, 8, 44 S.Ct. 424, 68 L.Ed. 873 (1924). The classic Ponzi Scheme involves an investor who invests in a business venture based on promises of large returns on their investments. In Re Independent Clearing House 41 B.R. 985, 994 fn. 12 (Bankr.D.Utah 1984). In the original Ponzi case, investors were promised a return of three dollars for every two dollars lent to the debtor. — Cunningham v. Brown, supra at 8.

Neither the facts of Cunningham v. Brown nor the definition in Independent Clearing House apply to BRNA. Appellant did not invest any money with BRNA nor expect that BRNA itself would use its investment skills to provide a return. Mr. Bozek looked solely to his own investment skill. BRNA was merely the vehicle of administration.

Furthermore, the logic of the opinion below creates the danger of labelling all

bankrupts Ponzi-type Schemes. Substantially all bankrupts use after acquired funds in attempts to avoid bankruptcy.

The transfer of metals to Mr. Bozek was in the ordinary course of the business affairs of both appellant and debtor.

CONCLUSION

The published opinion below is erroneous in several respects as it shifts burden of proof to the preference defendant and creates a new preference action that deprives the preference defendant of his procedural due process rights. While Mr. Bozek is not unmindful of the policy of equality among creditors, it is fundamentally unfair to recover a preference against a non-creditor purchaser merely to increase the pot from which the Trustee and his attorneys will draw funds and attorneys fees and eventually

provide some token distribution to creditors.

Second, even if the existence of a preference in this case is arguable, the general policy of equality among creditors may only be used as a guideline in interpreting the statute Congress has enacted to govern the situation. By enacting the highly technical Section 547 Congress has mandated a compromise position. Section 547 does not merely uphold a general policy of equality among creditors. Instead, it balances this policy against other interests including the goal of furthering finality of transactions in the marketplace.

The Trustee may only avoid those transactions that fall under the carefully defined provisions of the statute. To do otherwise compromises the intent of Congress to permit this drastic remedy only in carefully defined circumstances.

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APPENDIX

SECTION 547.

(a) In this section-

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment,

whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable, including any extension, without penalty.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor-

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made-

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer-

(i) was an insider; and

(ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and

(5) that enables such creditor to receive more than such creditor would receive if-

(A) the case were a case under Chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer-

(1) to the extent that such transfer was

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was-

(A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made not later than 45 days after such debt was incurred;

(C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(D) made according to ordinary business terms;

(3) of a security interest in property acquired by the debtor-

(A) to the extent such security interest secures new value that was-

(i) given at or after the signing of a security agreement that contains

a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected before 10 days after such security interest attaches;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor-

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) of a perfected security interest in inventory or a receivable or the proceeds of

either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount be which the debt secured by such security interest exceeded the value of all security interest for such debt on the later of-

(A) (i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; and

(B) the date on which new value was first given under the security agreement

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1 So in Original. Probably should read "interests".

creating such security interest; or

(6) that is the fixing of a statutory lien that is not avoidable under 545 of this title.

(d) A trustee may avoid a transfer of property of the debtor transferred to secure reimbursement of a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section-

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from

the debtor against whom applicable law permits such transfer to be perfected cannot cquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, expect as provided in paragraph (3) of this subsection, a transfer is made-

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is

not perfected at the later of-

(i) the commencement of the case; and

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat.2597..

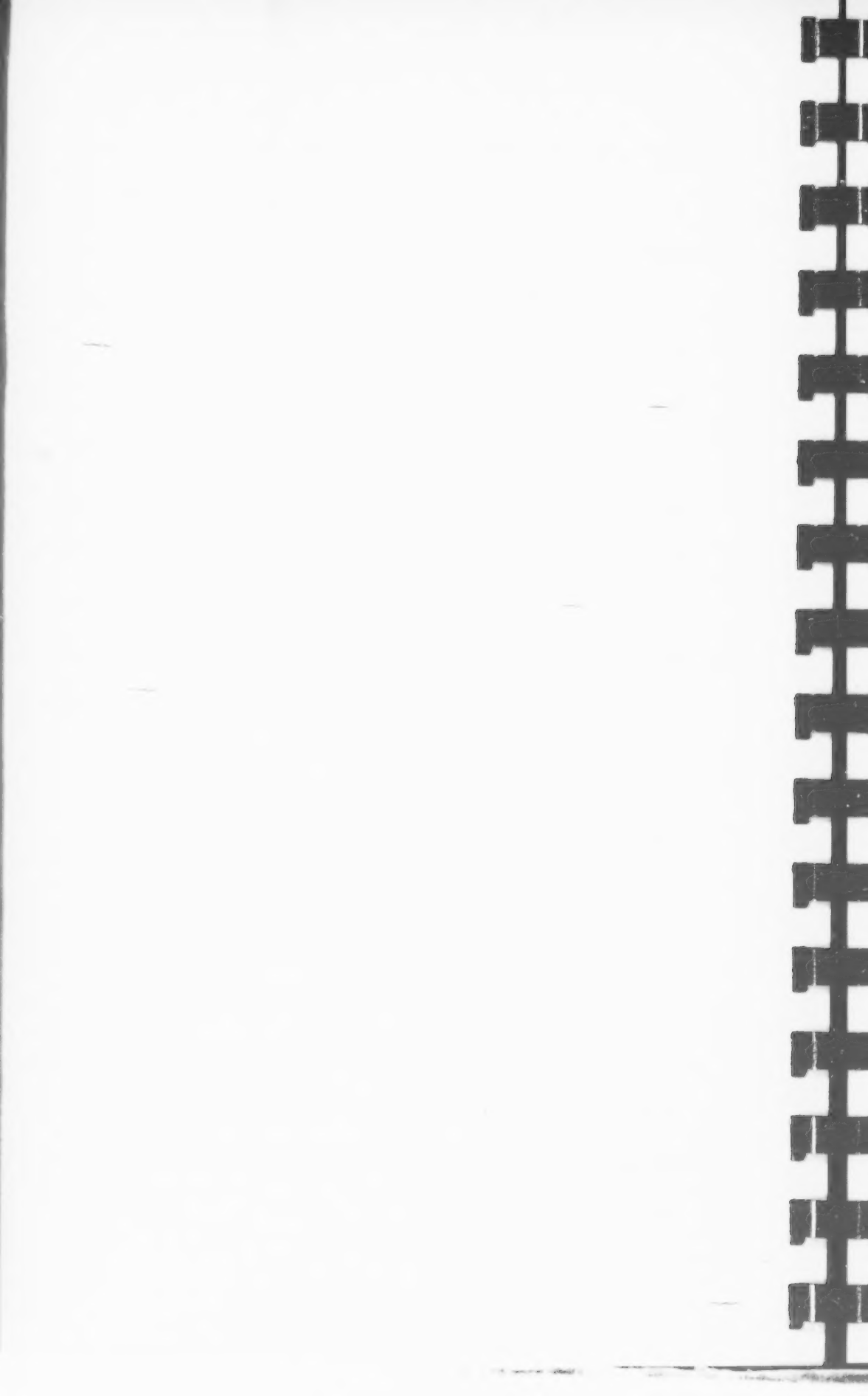
11 U.S.C. Section 101. Definitions

In this title ---

* * *

(4) "claim" means -

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent,



matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

* * *

(9) "creditors" means -

(a) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

* * *

(11) "debt" means-

Liability on a claim;

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2550-51.

RULE 301. FEDERAL RULES OF EVIDENCE

IN ALL CIVIL ACTIONS AND PROCEEDINGS NOT OTHERWISE PROVIDED FOR BY ACT OF CONGRESS OR BY THESE RULES. A PRESUMPTION IMPOSES ON THE PARTY AGAINST WHOM IT IS DIRECTED THE BURDEN OF GOING FORWARD WITH EVIDENCE TO REBUT OR MEET THE PRESUMPTION. BUT DOES NOT SHIFT TO SUCH PARTY THE BURDEN OF PROOF IN THE SENSE OF THE RISK OF NONPERSUASION, WHICH REMAINS THROUGHOUT THE TRIAL UPON THE PARTY ON WHOM IT WAS ORIGINALLY CAST.

Section 2221. CIVIL CODE

VOLUNTARY TRUST HOW CREATED AS TO TRUSTOR. Subject to the provisions of Section 852, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with

reasonable certainty;

1. An intention on the part of the trustor to create a trust, and,

2. The subject, purpose, and beneficiary of the trust.

Section 2222. CIVIL CODE

HOW CREATED AS TO TRUSTEE. Subject to the provisions of Section 852, a voluntary trust is created, as to the trustee, by any words or acts of his indicating with reasonable certainty:

1. His acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence and,

2. The subject, purpose, and beneficiary of the trust.

Section 2236 CIVIL CODE

A trustee who willfully and unnecessarily mingles the trust property with

his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events, and for the value of its use.

Section 2289 CIVIL CODE

When a trust exists without any appointed Trustee, or where all the Trustees renounce, die, or are discharged, the Superior Court of the county where the trust property, or some portion thereof, is situated, must appoint another Trustee, and direct the execution of the trust. The Court may, in its discretion, appoint the original number, or any less number of Trustees.

Section 15600 PROBATE CODE

(a) The person named as trustee may accept the trust, or a modification of the trust, by one of the following methods:

(1) Signing the trust instrument or the

trust instrument as modified, or signing a separate written acceptance.

(2) Knowingly exercising powers or performing duties under the trust instrument or the trust instrument as modified, except as provided in subdivision (b).

(b) In a case where there is an immediate risk of damage to the trust property, the person named as trustee may act to preserve the trust property without accepting the trust or a modification of the trust, if within a reasonable time after acting the person delivers a written rejection of the trust or the modification of the trust to the settlor or, if the settlor is dead or incompetent, to a beneficiary. This subdivision does not impose a duty on the person named as trustee to act.

Section 15660 PROBATE CODE

(a) If the trust has no trustee or if

the trust instrument requires a vacancy in the office of a cotrustee to be filled, the vacancy shall be filled as provided in this section.

(b) If the trust instrument provides a practical method of appointing a trustee or names the person to fill the vacancy, the vacancy shall be filled as provided in the trust instrument.

(c) If the vacancy in the office of trustee is not filled as provided in subdivision (b), on petition of a cotrustee or beneficiary, the court may, in its discretion, appoint a trustee to fill the vacancy. If the trust provides for more than one trustee, the court may, in its discretion, appoint the original number or any lesser number of trustees. In selecting a trustee, the court shall give consideration to the wishes of the beneficiaries who are 14 years of age or older.

BULLION RESERVE OF NORTH AMERICA

INTRODUCES THE

MEMBER ACCOUNT PROGRAM

Bullion Reserve of North America is a California corporation, headquartered in Los Angeles that has achieved impressive growth over the past three years. As one of America's largest precious metals dealers, we offer the only program in the Western Hemisphere that allows for purchases both by dollar amount or bullion weight - with the additional option of free vault storage.

Our Member Account program insures your privacy yet provides for full flexibility as well as 100% liquidity at all times. Purchase amounts from $20, at competitive commission rates, are an outstanding feature especially welcome for the smaller investor.

Whether your investment is small or large, Bullion Reserve's staff consists of competent individuals always ready to help you with your own individual purchase requirements.

WHAT IS THE COST OF PURCHASING BULLION?

When you purchase gold, silver, or platinum, you'll want to be certain that you do so as inexpensively as possible. But just as you cannot go to a bank and obtain a $10 bill for $9.90, so too with the price of bullion. The prices quoted daily in the newspapers or on radio or television are the wholesale or spot prices based on one troy ounce of .9999 Fine Gold, .999 Fine Silver,

and .9995 Fine Platinum.

Bullion Reserve of North America sells gold, silver, or platinum at the actual wholesale* spot price at the time we take your order or the London PM fixing, plus small commission. Unlike other firms, especially those selling "gold or silver" certificates, there are no other associated charges with a purchase. You never* pay "assay" charges either upon delivery to you, or resale to Bullion Reserve, N.A. Nor are you ever charged storage fees no matter how much bullion is involved.

Silver Bullion

Commission Schedule

$20.....	$999.99.....	5.0%
$1000.00.....	$2,499.99.....	4.5%
$2500.00.....	$4,999.99.....	4.0%
$5000.00.....	$9,999.99.....	3.5%
$10,000.00.....	$24,999.99.....	2.5%
$25,000.00.....	and over.....	1.5%

Gold & Platinum Bullion

Commission Schedule

$20.....	$999.99.....	2.5%
$1000.00.....	$9999.99.....	2.0%
$10,000.00.....	and over.....	1.5%

Additionally, Bullion Reserve of North America will repurchase your gold, silver or platinum bullion from you at the exact spot or London PM price (whichever you prefer), less 1%.

REFINING SURCHARGE

Smaller Ingots of silver or gold carry a disproportionately large refining charge as a percentage of the cost of the metal. This we cannot absorb and must pass along in the form of a surcharge.

Silver Bullion

One ounce ingot.....$1.50
Five ounce ingot.....$4.00
Ten ounce ingot.....$7.50

Gold Bullion

One gram ingot.....$1.50
Five gram ingot.....$2.50
Ten gram ingot.....$3.50

You need not pay a refining surcharge as long as you request delivery in bar sizes that are larger than those listed here. Also,k when you purchase bullion for storage there is never a surcharge.

If you do take delivery and pay a surcharge on a Johnson Matthey, Ltd. gold or silver ingot, you will receive 100% of the surcharge back should you resell the ingot(s) to Bullion Reserve N.A. Even with the surcharges on these bars, our silver and gold bullion prices are extraordinarily low. We urge you to check with other reputable dealers to determine just how low our prices actually are.

GOLD BULLION COINS

. . .

HOW ARE YOU PROTECTED WHEN YOU MAKE PAYMENT?

Your check or wire should be made in favor of B.R.N.A. Trust Account. Each Bullion Reserve employee responsible in any way for deposits or deliveries of bullion has undergone a rigorous background security check and is fully bonded. Your bullion moves directly from the refinery to our storage, or if you wish, delivered direct to you by fully insured registered mail.

HOW QUICKLY WILL YOU RECEIVE YOUR BULLION?

If you have requested delivery of any or all of your gold, silver, platinum, or bullion coins, Bullion Reserve will transmit a shipping order on the morning of the first business day after your good funds have been received by Bullion Reserve. Your order is then prepared for shipment and leaves the vault within 48 business hours. All shipments are by U.S. Registered Mail, return receipt requested, and seldom take longer than one week from our vault to you.

Each delivery from our vault to an address you designate will incur a $7.50 charge. This includes handling, postage, and insurance. For vault storage only, there is never a delivery charge.

WHAT IF YOU DON'T WISH IMMEDIATE DELIVERY OF YOUR SILVER OR GOLD BULLION?

Many of our customers prefer the convenience, as well as security of our vault. One outstanding feature of your Member Account program is that you never pay storage charges no matter how much bullion you have at our vault.

HOW SAFE IS YOUR BULLION?

Perpetual Storage, Inc. is home for the most important records of many of the nation's top corporate and financial institutions. Located in Utah, deep within the heart of the Wasatch Range of the Western Rocky Mountains, it is totally secure from fire and flood. Your bullion rests under two hundred feet of solid granite overburden-safe from all manner of natural and unnatural calamities.

Perpetual Storage, Inc. is synonymous with security,k being one of the few vaults in the world that have never experienced a theft. Your bullion, when stored at Perpetual, is insured under Lloyds of London policy for $40,000,000.

Finally, if you choose storage, your bullion and bullion coins are placed under the trusteeship of Intermountain Depository Corporation. The Intermountain Depository Corporation is a wholly owned subsidiary of Bullion Reserve whole sole purpose is to act as trustee for the bullion and bullion coins of the customers of Bullion Reserve of North America. Intermountain Depository Corporation secures your bullion and bullion coins from any potential claims as well as segregates them from Bullion Reserve's own bullion and bullion coin deposits.

WHERE SHOULD YOU STORE YOUR BULLION IF YOU TAKE DELIVERY?

That's a highly personal matter and is, of course, up to you. You may prefer your own safety deposit box, or even your own home, although we don't recommend that -

especially for silver which is rather bulky. Unlike a safe deposit box, your bullion is insured at Perpetual Storage. Also, the IRS may seal your bank deposit box under certain circumstances.

Furthermore, under the little noticed Depository Institution Deregulation and Monetary Control Act, the Comptroller of the Currency, at the direction of the President, is able to impose selective bank holidays, city by city without prior approval of Congress. In simple terms, your bank may be closed down without warning - at a time when you actually may need access to your bullion most.

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Attorneys for Plaintiff

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	CHAPTER 7
BULLION RESERVE OF NORTH AMERICA, a California Corporation; and related cases,	CASE NO: LA 83-18026-BR Consolidated with Case Nos. LA 83-18125-BR through LA 83-18128-BR and LA 83-18130-BR through LA 83-18141-BR
Debtor,	
	ADV. NO. LA84-52169-BR
CURTIS B. DANNING, Chapter 7 Trustee,	PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RE MOTION FOR SUMMARY JUDGMENT
Plaintiff,	
vs.	
THEODORE B.BOZEK,	Hearing
Defendant.	Date: January 24, 1986 Time: 2:00 p.m. Room: Courtroom "A"

This matter came on for hearing at 2:00 p.m. on January 24, 1986, upon the "Motion for Summary Judgment on 'Complaint to Avoid and Recover Transfers of Property Pursuant to Sections 547 and 550 of the Bankruptcy Code'" (the "Motion"), filed by plaintiff Curtis B. Danning, Chapter 7 Trustee, before the Honorable Barry Russell, United States Bankruptcy Judge, Courtroom A, United States Courthouse, 312 N. Spring Street, Los Angeles, California. Plaintiff Curtis B. Danning, Chapter 7 Trustee, appeared by his counsel, Cynthia M. Cohen and Michael H. Goldstein, Members of Stutman, Treister & Glatt Professional Corporation. Defendant Theodore B. Bozek (hereinafter referred to as "Defendant") appeared by his counsel, Ronald Gold of Murphy and Gold. The Court having considered the pleadings, declarations, depositions, documents and memoranda filed and presented by and on *beha;f of the

parties, having heard and considered the arguments and representations of counsel presented on behalf of the parties, having considered the proceedings heretofore and herein, having considered the record in this action, and good cause appearing,

NOW, THEREFORE, THE COURT MAKES ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW AS FOLLOWS:

FINDINGS OF FACT

1. BRNA was a California corporation which filed a petition for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C., on October 3, 1983. On January 10, 1984m the Bankruptcy Court converted BRNA's case to a case under chapter 7 of the Bankruptcy Code. Curtis B. Danning is the duly appointed and acting chapter 7 trustee of BRNA (the "Trustee").

2. This lawsuit is one of nearly 2,000

adversary proceedings commenced by the Trustee which constitute both (a) an action under 11 U.S.C. Section 547 to avoid a preferential transfer made by BRNA to a member of the public who participated in BRNA's Member Account Program, and (b) an action under 11 U.S.C. Section 550 to recover the property transferred or its value.

3. Prior to the filing of its chapter 11 petition, BRNA purported to offer a Member Account Program, BRNA obtained substantial sums of money which it appropriated to its own use and benefit. During the two and a half years which preceded BRNA's chapter 11, thousands of members of the public participated in the program.

4. In order to participate in BRNA's Member Account Program, a person had to complete and sign an application, and return the application along with a nominal "administrative fee" to BRNA. A true and

correct copy of the application is attached to the Declaration of Bruce M. Frerer as Exhibit A. Significantly, the application makes no mention of the word trust and, indeed, does not contain any language whatsoever to which a participant could conceivably refer in an effort to establish a trustee-beneficiary relationship between BRNA and the participant. In signing the application, the applicant accepted the terms of the "Member Guarantee," a true and correct copy off which is attached to the Declaration of Bruce M. Frerer as Exhibit B. The "Member Guarantee" likewise does not mention the word trust and does not contain any language whatsoever which could be relied on the establish a trustee-beneficiary relationship between BRNA and the participant.

5. Defendant returned to BRNA the application, along with the nominal administrative fee, and thereby opened a

member account in BRNA's Member Account Program. Neither at the time that Defendant opened a member account in BRNA's Member Account Program nor at any other time did BRNA and Defendant sign any document setting forth obligations or promises of one party to the other.

6. After opening a member account, on or about December 21, 1981, March 19 and June 14, 1982, and June 6, 1983, Defendant sent funds to BRNA.

7. According to Defendant, Defendant never intended to extend credit to BRNA, but, because of BRNA's actions with respect to the funds received from Defendant and others, Defendant in fact became a creditor of BRNA when he sent in his funds.

8. Upon receiving the funds sent by Defendant and other program participants, BRNA deposited them in one of its various bank accounts. BRNA never deposited any such

funds in any trust account specifically employed to segregate funds received from any one participant or all participants in the Member Account Program from BRNA's other funds. Similarly, BRNA deposited funds in its various bank accounts which it had received from sources other than program participants. There were at least the following ten different specific sources of cash deposits into the various bank accounts maintained by BRNA:

(a) cash received from program participants;

(b) cash received from customers who immediately took delivery of precious metals (this includes earned commission and delivery charges);

(c) case realized from liquidating a program participant's account where the value of precious metals delivered depreciated;

(d) cash received from Nabih Zaczac for margin calls with respect to a specific commodities trading account maintained at Conti Commodity Services, Inc. in the name of North American Commodity Reserve;

(e) cash received from commodities trading conducted for the benefit of Alan Saxon and allegedly BRNA;

(f) cash received from sales of customer list;

(g) cash received from customer membership fees;

(h) cash received from employees as repayment of cash advances;

(i) cash received from North American Commodity Reserve's Dallas operation; and

(j) cash received from the deposit on August 29, 1983 of a cashier's check payable to Guilherme Gallart Zaczac in the

amount of $519,417.94 which Alan Saxon allegedly misappropriated to cover up the misdeeds in which he engaged through BRNA. BRNA constantly made transfers among virtually each and every one of its bank accounts. Thus, the funds received from Defendant were commingled with BRNA's other funds. BRNA used the funds in its various checking accounts for its own purposes, including, but not limited to: (1) trading on the commodities market, (2) transferring funds to program participants, (3) financing its operations in Texas and Hong Kong, (4) funding its operating expenses; (5) making cash advances to employees and (6) purchasing precious metals for its own account. Thus, precious metals shipped to PSI for storage were purchased with funds from the commingled monies in BRNA's various bank accounts, some of which purchase funds were not received from program participants. For example,

funds equal to the proceeds of the Zaczac cashier's check apparently was used to purchase bullion for shipment to PSI to fill the growing panic liquidation requests received from program participants on the eve of bankruptcy. Accordingly, it is impossible to trace Defendant's funds, or any other program participant's funds, to specific disbursements or assets of BRNA. In short, BRNA's business was the acquisition and disbursement and disposition of funds and assets as it saw fit and for its own purposes -- illegitimate or not.

9. There is no purchase of metals by BRNA which can be directly traced as having been made with any funds received from Defendant or as having been made in response to any request to purchase metals made by Defendant. Nor is th4re any purchase of metals by BRNA which can be directly traced as having been made with the specific funds

received from any other particular program participant or as having been made in response to any request to purchase metals made by any other program participant who elected not to take immediate delivery of metals. In fact, the source of the funds used to purchase metals cannot be traced tp any identifiable source.

10. At not did BRNA or PSI segregate or account for any metals in such a manner that particular bars or ingots of bullion or particular coins could be identified as belonging or otherwise relating to Defendant or any other specific participant in the Member Account Program or anyone else other than BRNA itself. BRNA maintained only one account with PSI FOR THE STORAGE OF PRECIOUS METALS. BRNA represented to PSI that it owned all of the metals stored in the account and PSI did not even know the identity of BRNA's customers until BRNA instructed PSI to

deliver bullion to particular persons. BRNA's account with PSI was in BRNA's name alone, until July 28, 1983, when BRNA changed the name to that of its purported subsidiary Intermountain Depository Corporation ("IDC"). Even after this name change, PSI processed the storage of bullion in the same manner as it had for BRNA and continued to use storage forms bearing the name of BRNA. To PSI, IDC was indistinguishable from BRNA and, rightly so, since IDC existed in name only. IDC did not keep separate books and records, did not receive commissions, or any other income, did not purchase precious metals and never entered into any written agreements with BRNA or any of the program participants. In short, BRNA treated its metal storage account at PSI in the same manner as it did its various checking accounts -- all under BRNA's name, all commingled, all for use at BRNA's pleasure and as it saw fit.

11. The account statements of Defendant's account and accounts of other participants in the Member Account Program prepared by BRNA did not indicate by var or ingot size, serial number, or otherwise, that any specific, identifiable metals were being held or stored by BRNA on behalf of Defendant and, in fact, no such specific or identifiable metals were held or stored by BRNA on behalf of Defendant.

12. BRNA did not store sufficient metals at PSI to account for the orders placed by all of the participants in the Member Account Program. BRNA never stored more than approximately $3 million worth of precious metals with PSI at any one time. In fact, in the 90 days preceding the commencement of BRNA's bankruptcy, BRNA had to purchase significantly more metals in the open market that it had previously for storage at PSI in order to meet the increased panic demands for

account liquidations during that period. The metals were shipped to PSI who in turn, delivered the metals to BRNA's liquidating customers upon BRNA's instructions.

13. As set forth in BRNA's records, at the time BRNA filed its chapter 11 petition, had BRNA in fact purchased and stored metals for outstanding participants in the Member Account Program, BRNA would have had in storage in PSI's vault metals aggregating approximately $63 million. At that time, however, the aggregate value of the metals BRNA actually had in storage in PSI's vault was less than $1 million.

14. When a program participant advised BRNA that he desired to liquidate all or part of his member account, BRNA would send the participant, according to his choice, either (i) metals from the minimal amount of metals which BRNA kept in storage with PSI for the purpose of handling account liquidations and

any other needs of BRNA and which BRNA replenished through open market purchases with its general funds, or (ii) a check from one of BRNA's bank accounts. Both disbursements thus came from assets in BRNA's name which represented a commingled pool from all BRNA's sources of cash receipts. According to BRNA's records, BRNA never sent to a program participant who requested liquidation either metals or cash that ever had been or could be identified as belonging to or traceable to that participant.

15. Prior to the time that Defendant advised BRNA that he desired to liquidate his account and take delivery, Defendant had no opportunity to specify the size of bar (s) or ingot (s) which he desired and not bar (s) or ingot (s) of a specified size were selected or held for him. At the time Defendant advised BRNA that he desired to liquidate his account and take deliver5y, Defendant was

permitted to and did specify the size of bar (s) or ingot (s) he desired and BRNA selected and delivered to Defendant in liquidation of his account bar (s) or ingot (s) conforming to Defendant's specification. The selected and delivered bar (s) and ingot (s) conforming to Defendant's specification. The selected and delivered bar (s) and ingot (s) were obtained by BRNA from aggregate and commingled metals *stor4ed in BRNA's name at PSI at the time the shipment to Defendant was made.

16. On August 22, 1983, at Defendant's request, BRNA transferred, from its metals stored in PSI's vault, metals to PSI to be stored for Defendant in an account maintained by PSI for Defendant, of the following kinds and amounts:

(a) 14,950 ounces of silver,

(b) twelve ounces of gold, and

(c) thirty-nine (39) ounces of

platinum.

As of the date of the transfer, those metals had a total market value of $212,138.60.

17. The metals transferred to Defendant ere held by BRNA as its property.16

18. By reason of the foregoing, there never was a trust agreement between BRNA and Defendant.

19. By reason of the foregoing, the parties never created a trust in favor of Defendant.

20. By reason of the foregoing, there never was a trust res held by BRNA, or anyone else, for Defendant.

21. By reason of the foregoing, there never was a product of a trust res which was held by BRNA, or anyone else, for Defendant.

22. By reason of the foregoing, the property transferred to Defendant was not a trust res or a product of a trust res.

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16 Declaration of Bruce M. Frerer, p.7.

23. By reason of the foregoing, the transfer to Defendant was in satisfaction of a debt BRNA owed Defendant.

24. By reason of the foregoing, the transfer to Defendant was in satisfaction of an antecedent debt.

25. BRNA was insolvent at the time of the transfer described in paragraph 16 hereinabove.

26. The transfer of the metals was more than forty-five (45) days after the date on which Defendant had sent his funds for his member account to BRNA and was within ninety (90) days prior to the filing of BRNA's chapter 11 petition.

27. Defendant is not in the business of buying and selling precious metals.

28. BRNA's transfer of metals to Defendant was not in the ordinary course of BRNA's or Defendant's business.

29. Defendant's transaction with BRNA

was not a consumer transaction.

30. The numerous requests for liquidation, including that of Defendant, which were made by the participants in the Member Account Program during the summer of 1983 were a principal cause of BRNA's bankruptcy. BRNA transferred approximately $18 million in cash and precious metals within the ninety days before the commencement of its bankruptcy case to program participants.

31. Defendant was a creditor of BRNA when the transfer was made and Defendant received more than Defendant would have received if the transfer had not been made and Defendant was paid in the course of a liquidation of BRNA under chapter 7 of the Bankruptcy Code.

CONCLUSIONS OF LAW

1. Each of the foregoing Findings of

Fact which may be construed as a Conclusion of Law is hereby deemed to be a Conclusion of Law, and each of the following Conclusions of Law which may be construed as a Finding of Fact is hereby deemed to be a Finding of Fact.

2. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. Sections 157 and 1334 (as enacted or amended by the Bankruptcy Amendments and Federal Judgship Act of 1984), in that this adversary proceeding is a civil proceeding which is a core proceeding arising under title 11 of the United States Code and arising in a case under title 11 of the United States Code, In re Bullion Reserve of North America, LA 83-18026-BR, United States Bankruptcy Court, Central District of California, and in that this adversary proceeding has been referred to this Court by the United States District Court for the

Central District of California.

3. The property BRNA transferred to Defendant was not held by BRNA, or anyone else, in trust for Defendant or any other program participant.

4. BRNA never held Defendant's property in trust.

5. Any claim of Defendant against BRNA prior to the transfer to Defendant was a debt.

6. As a matter of federal bankruptcy law, fund flow assumptions cannot be employed to identify a res where the result would be to favor some creditors over similarly situated creditors.

7. The Bankruptcy policy of treating similarly situated creditors evenhandedly requires that Defendant's trust defense be rejected.

8. The property transferred by BRNA to Defendant was property of BRNA in which it

held both legal and equitable title.

9. The property transferred to Defendant was property of the debtor and if held by BRNA at the commencement of its bankruptcy case would have been property of BRNA's estate.

10. By reason of the foregoing, the transfer of BRNA's property to Defendant was preferential.

11. By reason of the foregoing, the transfer of property described in paragraph 16 of the Findings of Fact by BRNA to Defendant is avoidable pursuant to 11 U.S.C. Section 547(b).

12. The transfer by BRNA to Defendant was not part of an "ordinary course of business" transaction and is not, therefore, immune from avoidance pursuant to 11 U.S.C. Section 547(c)(2).

13. The transfer by BRNA to Defendant was not part of a "contemporaneous exchange

for new value given to the debtor" and is not, therefore, immune from avoidance pursuant to 11 U.S.C. Section 547(c)(1).

14. By reason of the foregoing, the trustee is entitled to recover from Defendant for the benefit of the estate the value of the property transferred, $212,138.660, pursuant to 11 U.S.C. Section 550.

15. Plaintiff Curtis B. Danning, Chapter 7 Trustee is entitled to the relief he seeks in the Motion -- that is summary judgment:

(a) adjudging and decreeing that the transfer of property to Defendant is avoided and set aside;

(b) awarding tp Plaintiff the return of the property transferred or the payment of $212,138.60, its cash equivalent value, together with interest thereon (from the date of the filing of the Trustee's complaint), and ordering Defendant to return or pay to Plaintiff said property or cash

equivalent value, together with interest thereon; and

(c) awarding to Plaintiff and ordering Defendant to pay Plaintiff's costs and disbursements, including reasonable attorneys' fees, with respect to this action.

DATED: 4-16-86

UNITED STATES BANKRUPTCY JUDGE

APPROVED AS TO FORM AND CONTENT:

DATED: Los Angeles, California
_____, 1986

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	) BKR. CASE NO.
	) LA 83-18026-BR
BULLION RESERVE OF NORTH AMERICA, a California corporation; and related cases,	) Chapter 7
Debtors.	)

RICHARD CUMMINS, AND CLAIRE J. CUMMINS, Appellants. v. CURTIS B. DANNING, Chapter 7 Trustee, Appellee.	CASE NO. CV-86-2537-MRP ADVERSARY PROCEEDING NO. LA 84-52171-BR
FRANK W. HUDNALL, Appellant. v. CURTIS B. DANNING, Chapter 7 Trustee, Appellee.	CASE NO. CV-86-2538-MRP ADVERSARY PROCEEDING NO. LA 84-52170-BR
JAMES B. HUMFELD, Appellant. v. CURTIS B. DANNING, Chapter 7 Trustee, Appellee.	CASE NO. CV-86-2952-MRP ADVERSARY PROCEEDING NO. LA 84-52167-BR

DR. JOHN N. LOEB, Appellant. v. CURTIS B. DANNING, Chapter 7 Trustee, Appellee.	CASE NO. CV-86-2953-MRP ADVERSARY PROCEEDING NO. LA 84-52174-BR
FREDERICK H. DEEVER Appellant. v. CURTIS B. DANNING, Chapter 7 Trustee, Appellee.	CASE NO. CV-84-2229-MRP ADVERSARY PROCEEDING NO. LA 84-52163-BR
DARRYL G. RHOLL AND ANN L. RHOLL, Appellants. v. CURTIS B. DANNING, Chapter 7 Trustee, Appellee.	CASE NO. CV-86-2536-MRP ADVERSARY PROCEEDING NO. LA 84-52186-BR

THEODORE P. BOZEK,	)	CASE NO. CV-86-2539-MRP
Appellant.	)	ADVERSARY PROCEEDING NO. LA 84-52169-BR
v.	)	
CURTIS B. DANNING, Chapter 7 Trustee,	)	**ORDER AFFIRMING SUMMARY JUDGMENT**
Appellee.	)	

AT LOS ANGELES, CALIFORNIA, IN THIS DISTRICT, THIS _____ DAY OF _____, 1986.

The above-reference Appellants' appeals from the Bankruptcy Court's Summary Judgment entered in each of the above-referenced adversary proceedings came on for hearing before the undersigned on Monday, September 22, 1986 at 10:00 a.m., in Courtroom No. 15, United States Courthouse, 312 N. Spring Street, Los Angeles, California 90012. Appellants Cummins, Hudnall, Humfeld and Loeb appeared by their counsel fo record, Robert L. Ordin, of Loeb & Loeb. Appellants Deever

and Rholl appeared by their counsel of record, Thomas G. Kelch, of Gendall, Raskoff, Shapiro and Quittner. Appellant Bozek appeared by his counsel of record, Ronald gold of Murphy and Gold. Appellee, Curtis B. Danning, Trustee for Bullion Reserve of North America appeared by of North America appeared by his counsel of record, Isaac M. Pachulski and Michael H. Goldstein, members of Stutman, Treister & Glatt Professional Corporation.

Based upon the record below, the pleadings filed herein, the arguments of counsel presented at the hearing, and good cause appearing, it is hereby

ORDERED that the Bankruptcy Court's Summary Judgment entered in each of the above-referenced adversary proceedings is affirmed in all respects.

MARIANA R. PFAELZER
United States District Judge

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA]
] ss.
COUNTY OF LOS ANGELES]

I am a resident of the County of Los Angeles. I am over the age of 18 years and not a party to the within entitled action. My business address is 22235 Mulholland Highway, Woodland Hills, California 91364.

On April 9, 1988, I served the within:

PETITION FOR CERTIORARI

on the parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon, fully prepaid, in the U.S. Mail, at Woodland Hills, California, addressed to:

Mr. Isaac Pachulski
STRUTMAN, TREISTER & GLATT
3699 Wilshire Boulevard, Suite 900
Los Angeles, California 90010-2739

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on April 9, 1988, Woodland Hills, California.

Mina Small Mc Fadden

MINA SMALL MC FADDEN

87-1763

DOCKET NUMBER:

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1988

IN RE:
BULLION RESERVE OF NORTH
AMERICA, A California Corporation,
Debtors.

THEODORE P. BOZEK,
Petitioner,

Against

CURTIS B. DANNING, CHAPTER 7 TRUSTEE,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CASE NUMBER 86-6649

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re

BULLION RESERVE OF NORTH AMERICA, A California Corporation,

CURTIS B. DANNING, Chapter 7 Trustee,

Plaintiff-Appellee,

v.

THEODORE P. BOZEK,

Defendant-Appellant.

No. 86-6649

D.C. No. CV-86-2539-MRP

OPINION

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted
December 9, 1987—Pasadena, California

Filed January 11, 1988

Before: Joseph T. Sneed, Harry Pregerson and Alex Kozinski, Circuit Judges.

Opinion by Judge Pregerson

SUMMARY

Bankruptcy

Appeal from judgment. Affirmed.

Bullion Reserve of North America (BRNA) purported to be in the business of buying precious metals for the public through a member account program. Upon request, it would segregate and store a participant's bullion BRNA never fulfilled these obligations. Instead, it comingled funds and deposited them into its own bank accounts. Eventually, BRNA filed for bankruptcy under Chapter 11, which the bankruptcy court converted to a Chapter 7 proceeding. Appellant Bozek became a member, purchased bullion, and requested its storage. Shortly before BRNA filed for Chapter 11 relief, Bozek liquidated his account and received his bullion. Subsequently, BRNA's bankruptcy trustee brought this adversary action against Bozek to recover the bullion as a preferential transfer. The bankruptcy court granted summary judgment in favor of the trustee and the district court affirmed.

[1] Bozek argues, in effect, that he should be allowed to keep the bullion because he was a victim of BRNA's misconduct. [2] Property belongs to the debtor if its transfer will deprive the bankruptcy estate of something which could otherwise be used to satisfy the claims of creditors. [3] Here, the money BRNA used to purchase bullion came from comingled bank accounts. Because this money could have been used to pay other creditors, it presumptively constitutes property of the debtor's estate. [4] Although property held in trust by a bankruptcy debtor belongs to the beneficiary of the trust, [5] there is no indication that BRNA intended to assume the duties of a trustee. [6] Moreover, Bozek cannot trace the money he gave BRNA to the bullion he received. [7] Bozek contends he is not a creditor and that the transfer was not on account of

an antecedent debt. [8] This argument ignores the broad definitions of "creditor" and of "claim." [9] Bozek's contention that the transfer of bullion was not on account of an antecedent debt is also incorrect. [10] Bozek contends that the transfer cannot be set aside because it was a contemporaneous exchange for new value. [11] The 77 day time span between his payments and BRNA's bullion transfer is too great. [12] Further, this transfer cannot be set aside because it was not made in the ordinary course of business.

COUNSEL

Ronald Gold, Murphy & Gold, Woodland Hills, California, for the defendant-appellant

Isaac M. Pachulski, Theodore B. Stolman, Stutman, Treister & Glatt, Los Angeles, California, for the plaintiff-appellee.

OPINION

PREGERSON, Circuit Judge:

Theodore P. Bozek appeals from a district court's order affirming a bankruptcy court's grant of summary judgment in favor of the bankruptcy trustee for Bullion Reserve of North America (BRNA). The trustee, Curtis B. Danning, sued Bozek under 11 U.S.C. § 547(b) to set aside and recover an alleged preferential transfer made by BRNA to Bozek. We affirm.

BACKGROUND

BRNA was a California corporation that purported to be in the business of buying precious metals (bullion) for the public through a "member account program." Customers became

member account program participants by filling out a short application and paying a nominal administrative fee. Thereafter, program participants were entitled to purchase bullion through BRNA at wholesale prices fixed in the international market. BRNA charged a commission on all bullion orders it executed.

BRNA published a brochure describing its program. The brochure warranted that, upon request, BRNA would segregate and store a program participant's bullion in a storage vault at Perpetual Storage Incorporated. BRNA also represented that the stored bullion would be under the trusteeship of the Intermountain Depository Corporation, its wholly owned subsidiary.

In fact, BRNA never fulfilled its obligation to purchase and store bullion for program participants. Instead, BRNA comingled funds it received from program participants and deposited those monies into its own general bank accounts. Once in BRNA's accounts, the participants' funds were further comingled with income BRNA received from other sources. BRNA then used the money in its accounts to pay various expenses, including its general operating costs. BRNA did store a small amount of bullion at Perpetual Storage Incorporated. However, the amount of bullion BRNA stored at Perpetual Storage Incorporated was insufficient to cover storage orders placed by member account program participants. BRNA frequently had to purchase bullion on the open market to meet liquidation demands. Eventually, BRNA encountered financial difficulties and, on October 3, 1983, filed for relief under Chapter 11 of the Bankruptcy Code. On January 10, 1984, the bankruptcy court converted BRNA's Chapter 11 reorganization to a Chapter 7 liquidation proceeding.

Bozek became a member account program participant in December 1981. Thereafter, between 1981 and 1983, Bozek

purchased bullion through BRNA.[1] Like many program participants, Bozek asked BRNA to store his bullion. On August 22, 1983, forty-two days before BRNA filed for Chapter 11 relief, Bozek liquidated his member account and received bullion worth $212,138.60 from BRNA.

Subsequently, on August 9, 1984, BRNA's bankruptcy trustee brought this adversary action against Bozek under 11 U.S.C. § 547 (1982) to recover the bullion as a preferential transfer. The bankruptcy court granted summary judgment in favor of the trustee and the district court affirmed. We review the bankruptcy court's grant of summary judgment de novo. *See Nash v. Kester (In re Nash)*, 765 F.2d 1410, 1412 (9th Cir. 1985).

ANALYSIS

A bankruptcy trustee may recover property for the benefit of the debtor's estate if there (1) was a transfer; (2) of property of the debtor; (3) to or for the benefit of a creditor; (4) for or on account of an antecedent debt; (5) made while the debtor was insolvent; (6) made on or within ninety days before the date of the filing of the debtor's bankruptcy petition; (7) that enables the creditor to receive more than he would receive if the transfer had not been made and the debtor's estate liquidated according to the provisions of the bankruptcy code. 11 U.S.C. § 547(b) (1982).[2] The burden of proving the existence

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[1]Bozek sent funds to BRNA on December 21, 1981; March 19 and June 14, 1982; and June 6, 1983.

[2]The Bankruptcy Code was amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 553(a), 98 Stat. 333, 392 (1984). However, those amendments do not apply to this case because BRNA filed its bankruptcy petition in 1983. *Id.*; *see Henderson v. Allred (In re Western World Funding, Inc.)*, 54 B.R. 470, 473 n.1 (Bankr. D. Nev. 1985). Accordingly, all references in this decision to the Bankruptcy Code are to the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151326 (1982).

of these elements is on the bankruptcy trustee. *Grover v. Gulino (In re Gulino)*, 779 F.2d 546, 549 (9th Cir. 1985).

Bozek contends that the bankruptcy court erred by finding that (1) the bullion BRNA transferred to him was property of the debtor, (2) he was BRNA's creditor, and (3) the transfer of bullion was on account of an antecedent debt. Bozek also contends that, if the transfer was a preference, it was excepted from avoidance under § 547(c)(1) and (2).

1. Property of the debtor

[1] Bozek argues that the bullion he received was not property of the debtor, BRNA, because it was purchased with money fraudulently obtained from member account program participants. In effect, he argues that he should be allowed to keep the bullion because he was a victim of BRNA's misconduct.

[2] The term "property of the debtor" is not defined in the Bankruptcy Code. However, we define the term broadly. *Elliot v. Frontier Properties (In re Lewis W. Shurtleff, Inc.)*, 778 F.2d 1416, 1419 (9th Cir. 1985). Generally, property belongs to the debtor for purposes of § 547 if its transfer will deprive the bankruptcy estate of something which could otherwise be used to satisfy the claims of creditors. *Cf. Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1355-56 (5th Cir. 1986) (debtor has an interest in property under § 547 if the transfer diminishes the bankruptcy estate).

[3] Here, the money BRNA used to purchase bullion came from comingled bank accounts under BRNA's control. Because this money could have been used to pay other creditors, it presumptively constitutes property of the debtor's estate. *Henderson v. Allred (In re Western World Funding, Inc.)*, 54 B.R. 470, 475 (Bankr. D. Nev. 1985).[3]

[3]This presumption may be overcome in a variety of ways. For example, under a constructive trust theory, a program participant could claim any

The dual purpose of § 547 warrants reaching this result. That purpose is to discourage creditors from racing to the courthouse to dismember the debtor during its slide into bankruptcy and to further the prime bankruptcy policy of equal distribution among similarly situated creditors. *Valley Bank v. Vance (In re Vance)*, 721 F.2d 259, 260 (9th Cir. 1983). There is evidence that Bozek directed BRNA to transfer bullion to him after learning of BRNA's financial difficulties. More importantly, Bozek's acquisition of bullion during the ninety day preference period allowed him to recover 100% of his claim against BRNA, while other customers were left to share equally in BRNA's remaining assets. While we appreciate Bozek's plight as a victim, we are also mindful of our obligation to secure an equitable distribution of BRNA's assets among all its creditors.

[4] Bozek also contends that his agreement with BRNA created an express trust under California law that prevented his funds and their product, the bullion, from becoming property of the debtor. Property held in trust by a bankruptcy debtor belongs to the beneficiary of the trust. *Elliot v. Bumb*, 356 F.2d 749, 753 (9th Cir.), *cert. denied*, 385 U.S. 829 (1966). State law determines whether a trust exists in federal bankruptcy proceedings. *Toys "R" Us, Inc. v. Esgro, Inc. (Matter of Esgro, Inc.)*, 645 F.2d 794, 797 (9th Cir. 1981).

[5] There is no indication that BRNA intended to assume the duties of a trustee. *See* Cal. Civ. Code § 2222 (West 1985) (repealed July 1, 1987) (trust created as to trustee by conduct indicating his acceptance of trust). The member account program brochure specified that the Intermountain Depository Corporation would be a trustee for participants' bullion stored at Perpetual Storage Incorporated.[4] BRNA never

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funds traced through BRNA's comingled accounts. *See Elliot v. Bumb*, 356 F.2d 749, 754 (9th Cir.), *cert. denied*, 385 U.S. 829 (1966). But here, Bozek is unable to trace his funds to the bullion he received from BRNA.

[4]Apart from the brochure, no other document mentions the existence of a trust relationship.

stated it would be a trustee of the funds it received from program participants.

[6] Moreover, even if an express trust were created, Bozek would still have a duty under federal bankruptcy law to trace his funds to the bullion he received. Such a tracing requirement is necessary to further the Bankruptcy Code's policy of equal distribution among similarly situated creditors. *See Elliott*, 356 F.2d at 755 (state trust law must be applied in a manner consistent with federal bankruptcy policy). Here, Bozek cannot trace the money he gave BRNA to the bullion he received. Therefore, the bullion is property of the debtor under § 547.[5]

2. Creditor and Antecedent Debt

[7] Bozek contends he is not a creditor and that the transfer was not on account of an antecedent debt because BRNA did not owe him anything before making the bullion transfer. Bozek bases his argument on the idea that he never had a creditor's claim against BRNA because bullion was transferred to him upon demand and he did not suffer economic injury.

[8] This argument ignores the Bankruptcy Code's broad definitions. A "creditor" is defined as an "entity that has a claim against the debtor." 11 U.S.C. § 101(9) (1982). "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(4) (1982). The legislative history of the Bankruptcy Code indicates that Congress intended to provide the broadest possible definition of

[5]California trust law is not to the contrary. *See, e.g., Kobida v. Hinkelmann*, 53 Cal. App. 2d 186, 195, 127 P.2d 657, 661-62 (1942) (noting that when a trustee is insolvent, and the rights of other creditors are involved, a beneficiary must trace his funds through a trustee's comingled account).

"claim" when it enacted § 101(4). *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 309, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6266; S. Rep. No. 989, 95th Cong. 2d Sess. 21, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5808; *see also Ohio v. Kovacs*, 469 U.S. 274, 279 (1985); *Kallan v. Litas*, 47 B.R. 977, 982-83 (N.D. Ill. 1985).

Under these definitions, it is clear that Bozek became a creditor when he transferred funds to BRNA for the purchase of bullion. At that moment, Bozek accrued a right to demand bullion from BRNA. This right, although unmatured, constituted a "claim" under the Bankruptcy Code. *See Grover v. Gulino (In re Gulino)*, 779 F.2d 546, 551-52 (9th Cir. 1985) (transferee becomes a creditor by making a payment under a contract to purchase property).[6]

[9] Bozek's contention that the transfer of bullion was not on account of an antecedent debt is also incorrect. "Antecedent debt" is not defined in the Bankruptcy Code. However, "debt" is defined as "a liability on a claim." 11 U.S.C. § 101(11) (1982). The terms "debt" and "claim" are coextensive. When a creditor has a claim against the debtor, the debtor owes a debt to the creditor. H.R. Rep. No. 595, 95th Cong. 1st Sess. 310, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6267; S. Rep. No. 989, 95th Cong., 2d

[6]To support his contention that he is not BRNA's creditor, Bozek erroneously relies on *Richardson v. Shaw*, 209 U.S. 365 (1908). In *Richardson*, the Supreme Court found that no preference arose when an insolvent stockbroker returned stock he held for a client. The Court held that the broker was "essentially a pledgee." 209 U.S. at 380. The Court also implied that the client was not a creditor because he held a pledgor's interest in the stock he received. *Id.* However, *Richardson* was decided under prior bankruptcy law when the definition of "claim" was not as broad. *See Matter of Mandalay Shores Cooperative Housing Association*, 54 B.R. 632, 635 (Bankr. M.D. Fla. 1984) (Congress intended to give "claim" in the Bankruptcy Code a broader definition than under previous law). Under modern bankruptcy law, the *Richardson* client would be a creditor because his pledgor's interest would be a claim. *See Herman Cantor Corp. v. Central Fidelity Bank (In re Herman Cantor Corp.)*, 15 B.R. 747, 749 (Bankr. E.D. Va. 1981).

Sess. 23, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5809; *see also Henderson*, 54 B.R. at 476. Bozek accrued a claim against BRNA when he paid for the bullion. Likewise, BRNA incurred a debt to Bozek as of this time. Therefore, the subsequent transfer of bullion was on account of an antecedent debt.

3. Exceptions to § 547(b)

[10] Bozek has the burden of proving that the bullion transfer is excepted from the trustee's avoidance power. *In re American Ambulance Service, Inc.*, 46 B.R. 658, 660 (Bankr. S.D. Cal. 1985). Bozek first contends that the transfer cannot be set aside because it was a contemporaneous exchange for new value under 11 U.S.C. § 547(c)(1). In order for a transfer to come within this exception, it actually must be "substantially contemporaneous" with the giving of new value by the creditor. *Ray v. Security Mut. Finance Corp. (In re Arnett)*, 731 F.2d 358, 364 (6th Cir. 1984).

[11] Bozek has not shown that he received the bullion near the time he delivered funds to BRNA.[7] Bozek last paid BRNA for bullion on June 6, 1983, but he did not receive the bullion until August 22, 1983. The seventy-seven day time span in this case between Bozek's payments and BRNA's bullion transfer is too great to be considered "substantially contemporaneous."

[12] Bozek also argues that the transfer cannot be set aside because it was made in the ordinary course of business. *See* 11 U.S.C. § 547(c)(2)(1982). Recently, this court held that trans-

[7]Bozek claims that he received bullion at Perpetual Storage Incorporated at the time that he delivered funds to BRNA. However, the record indicates BRNA did not buy and store metal for Bozek upon receiving his money. Rather, BRNA comingled Bozek's money with that of other customers and purchased bullion for storage in very small amounts. Therefore, it cannot be said that BRNA purchased bullion for any particular customer.

fers made in a "Ponzi" scheme[8] are not made in the ordinary course of business. *Graultv. Brooks (Matter of Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.)*, 819 F.2d 214, 216 (9th Cir. 1987). In *Graultv*, we explained that Congress intended the ordinary course of business exception to apply only to transfers by legitimate business enterprises. *Id.* at 217. We also noted that the Bankruptcy Code's purpose was not to protect one victim of a debtor's fraud at the expense of others. *Id.*

Our reasoning in *Graultv* applies here. BRNA was a fraudulent business of the type Congress did not intend to protect under § 547(c)(2). Moreover, it would be inequitable to allow Bozek to obtain a 100% recovery on his claim while relegating other defrauded program participants to general unsecured creditor status in BRNA's bankruptcy proceeding. Equity requires that all these creditors share equally in whatever assets are available. *Id.* at 217.[9]

AFFIRMED.

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[8]A "Ponzi" scheme is any sort of fraudulent arrangement that uses later acquired funds or products to pay off previous investors. *See Merrill v. Abbott (In re Independent Clearing House)*, 41 B.R. 985, 994 n.12 (Bankr. D. Utah 1984) (describing history of "Ponzi" schemes), modified, 62 B.R. 1181 (D. Utah 1986). The record indicates that BRNA was conducting such a scheme when it used newly acquired funds, from its comingled accounts, to buy bullion for customers who demanded their metal.

[9]The ordinary course of business exception is inapplicable for another reason. The Bankruptcy Code only protects a preferential transfer that is made within forty-five days after the debtor incurs a debt to the creditor. 11 U.S.C. § 547(c)(2)(B) (1982). Here, BRNA owed a debt to Bozek for more than forty-five days before transferring bullion to him.

(3)

87 1763

IN THE

Supreme Court of the United States

October Term, 1987

No. ____

In re

BULLION RESERVE OF NORTH AMERICA,
a California corporation; and related cases,

Debtors.

THEODORE P. BOZEK, *Petitioner,*

v.

CURTIS B. DANNING, CHAPTER 7 TRUSTEE, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Case No. 86-6649

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are there any special and important reasons justifying this Court reviewing a grant of summary judgment avoiding a preferential transfer where the evidence in the record establishing the elements of an avoidable preferential transfer is uncontroverted and the applicable law is well established and not the subject of conflicting appellate decisions?

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IN THE

Supreme Court of the United States

October Term, 1987

No. ____

In re

BULLION RESERVE OF NORTH AMERICA,
a California corporation; and related cases,

Debtors.

THEODORE P. BOZEK, *Petitioner,*

v.

CURTIS B. DANNING, CHAPTER 7 TRUSTEE, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Case No. 86-6649

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE[1]

I. Procedural History.

On October 3, 1983, Bullion Reserve of North America ("BRNA") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code.[2] Thereafter, the case

[1] Because Petitioner misstates the uncontroverted facts established by the evidence in the record and makes statements of "fact" which are not supported by any admissible evidence in the record, Respondent is compelled to present a detailed statement of the case.

[2] BRNA's bankruptcy case was commenced on October 3, 1983. Accordingly, that version of title 11 of the United States Code existing prior

(footnote continued on next page)

was converted to a case under chapter 7 of title 11 of the United States Code, and Curtis B. Danning was appointed Trustee ("Trustee" or "Respondent").

In August 1984, the Trustee filed his Complaint (ER at 1:1)[3] to avoid a transfer of property (precious metals) to Petitioner as a preferential transfer under 11 U.S.C.A. § 547 (b) (West 1979), and to recover the value of the property transferred under 11 U.S.C. § 550.[4] Although Petitioner filed an Answer denying the receipt of metals (ER at 2:5), he

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(footnote continued from preceding page)

to the 1984 Amendments to the Bankruptcy Code applies. Hereinafter, all references to title 11 of the United States Code as it existed prior to the 1984 Amendments will be cited as "11 U.S.C. § .....".

[3] Respondent will use the following conventions to cite to the record below:

(1) "ER" refers to the Excerpts of Record filed by Petitioner Bozek in connection with the proceedings before the Ninth Circuit.

(2) "AER" refers to the Excerpts of Record filed by Respondent in connection with the proceedings before the Ninth Circuit.

(3) "BCR ....." refers to the pleading with the designated Docket No. on the Bankruptcy Court's Clerk's record for the adversary proceeding: *Danning, Trustee v. Bozek*, (Adv. No. LA 84-52169-BR).

(4) "DCR-1" refers to the pleading with the designated Docket No. on the District Court's Clerk's record for the bankruptcy case: *In re Bullion Reserve of North America* (Case No. 83-18026-BR).

(5) "DCR-2" refers to the pleading with the designated Docket No. on the District Court's Clerk's record for the appeal: *Bozek v. Danning, Trustee* (Appeal Case No. CV 86-2539-MRP).

(6) "BRT" refers to the Bankruptcy Court Reporter's Transcript.

(7) "at #:#" refers to the document number and page number of that document, respectively, except for citations to reporter's transcripts in which case it refers to the page number and line number of the transcript.

[4] The Trustee's Complaint against Petitioner sought the recovery of $212,138.60, which amount represents the aggregate value of the metals which were transferred on August 22, 1983 from the metals stored in BRNA's account at Perpetual Storage, Inc. ("PSI") to a newly-established account in Petitioner's name at PSI.

subsequently admitted in his deposition that, after learning of BRNA's financial difficulties, he had BRNA transfer metals to his own account at PSI in August of 1983. (AER at 10:396-98). Petitioner had the opportunity to examine BRNA's books and records (AER at 3:107, 130) and depose those individuals with knowledge of BRNA's activities. (AER at 3:84-88, 91-98, 124-27, 150-53, 156-58, 283-85).

The Trustee filed a motion for summary judgment on December 3, 1986. (AER at 1:1).[5] The Petitioner submitted no evidence other than his own declaration and certain exhibits in opposition to the Trustee's Motion. (ER at 4:76; AER at 6:337-45).

Following a hearing at which it considered the argument of Petitioner's counsel,[6] the Bankruptcy Court entered summary judgment in favor of the Trustee on his complaint (AER at 10A:399A), along with findings of fact and conclusions of law. (AER at 11:399). The Bankruptcy Court concluded that the Trustee had established his *prima facie* case; Petitioner had not presented evidence creating a genuine issue of material fact; and the Trustee was entitled to summary judgment as a matter of law. (AER at 10A:399A). The Bankruptcy Court considered and rejected the arguments Petitioner raises before this Court.

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[5] Petitioner filed a motion for summary judgment in November 1984. (BCR 8). Petitioner's summary judgment motion was fully briefed by the parties. (BCR 8, 32). The motion was denied by the Bankruptcy Court. An Order denying Petitioner's summary judgment motion was lodged with the Court. (BCR 40).

[6] The Petitioner's assertion that no oral argument was permitted (Petitioner's Opening Brief at 3) was incorrect. (AER at 13:428-30).

Petitioner filed a notice of appeal from the summary judgment on March 28, 1986.[7] (AER at 11A:414A). After being transferred from the Ninth Circuit Bankruptcy Appellate Panel to the United States District Court (BCR Docket Entry dated 4/24/86), the appeal ultimately was assigned to the Honorable Marianna R. Pfaelzer (DCR-2 1) who affirmed the summary judgment in all respects by an Order entered on October 27, 1986. (ER at 6:223). Petitioner filed a timely notice of appeal under Fed. R. App. P. 4(a) on November 26, 1986. (ER at 7:229). The United States Court of Appeals for the Ninth Circuit affirmed the summary judgment. *Danning v. Bozek (In re Bullion Reserve of North America),* 836 F.2d 1214 (1988).

Petitioner now petitions this Court for a writ of certiorari. The petition for certiorari is simply a brief on essentially the same legal issues which Petitioner raised and briefed on appeal before the District Court and the Ninth Circuit. These issues were fully considered and rejected by both of these courts. As discussed below, the uncontroverted facts and the well established, nonconflicting law support the decisions of the courts below.

Petitioner's petition does not offer any basis for this Court exercising its discretion and granting certiorari. None of the usual reasons for this Court granting certiorari (or any other reasons) are raised by Petitioner. In fact, there are no special and important reasons for this Court granting certiorari.

II. Statement of the Facts.

The Trustee's action against Petitioner arises out of BRNA's "Member Account Program". Under this program,

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[7] Petitioner also filed a motion with the Bankruptcy Court to correct an alleged clerical error in the summary judgment. (BCR 48). By his motion, Petitioner sought a determination that he could return the bullion received from BRNA to satisfy the judgment in lieu of paying an amount equal to the value of the bullion at the time of the transfer. The motion was denied. (BCR 58). The propriety of that ruling has not been challenged on appeal.

BRNA received vast sums of money from numerous program participants by representing that it would purchase, store, and repurchase precious metals for them. (AER at 1:4; 2:55-56, 64-69; 3:89, 108-122). Persons who chose to purchase metals through BRNA were offered two alternatives: (1) having BRNA execute their purchase orders and immediately deliver to them the metal purchased for their account; or (2) asking BRNA to purchase and store bullion for them. *Id.* Petitioner and virtually all of BRNA's creditors chose to ask BRNA to purchase and store metal for them. (ER at 4:76; AER at 1:4, 6).

When a customer sought to purchase and store precious metals under this program, BRNA recorded the transaction in its computer system. (AER at 3:131, 4:290-92). However, BRNA never deposited the funds received from Petitioner, or from any other program participant, in any trust account specifically designated to segregate funds received from program participants from BRNA's other funds. Instead, funds received from Petitioner and other program participants were commingled in BRNA's bank accounts with funds received by BRNA from other sources. (AER at 1:4, 5-6; 2:56-61; 3:101, 103-22, 133-38, 142-48; 4:287-96).

BRNA used the commingled funds in its bank accounts for various purposes, including, but not limited to: (1) trading on the commodities market; (2) transferring funds to program participants; (3) financing its operations in Texas and Hong Kong; (4) funding its operating expenses; (5) making cash advances to employees; and (6) purchasing precious metals for its own account. (AER at 1:4, 5-6; 2:56-61; 3:108-12; 4:287-92). Thus, although an inventory of precious metals was maintained for BRNA at Perpetual Storage, Inc. ("PSI"), precious metals shipped to PSI for storage were purchased with funds from the commingled monies in BRNA's various bank accounts (AER at 1:4; 2:56-61; 3:100-01, 135-38, 147-48; 4:287-92), and the precious metals inventory was held in BRNA's account at PSI. (AER at 1:4, 8-13; 2:57-61; 3:159-281; 4:287-96). BRNA neither purchased metals for Petitioner or any specific customer

who elected the "metal storage" alternative, nor stored metals in a segregated, identifiable manner for Petitioner or any other customer. *Id.*[8] Accordingly, it is impossible to trace Petitioner's funds, or any other program participant's funds, into specific disbursements or assets of BRNA. (AER at 1:4; 2:57).

When a customer who had elected to have BRNA purchase and "store" bullion requested an account liquidation, the transaction was recorded on BRNA's computer system. (AER at 3:131; 4:290). If the customer requested cash, a check was drawn on BRNA's general, commingled account. (AER at 1:4; 2:60-61; 3:138-41, 144-45; 4:291-92). Alternatively, if the customer requested metals, metals were delivered from the limited inventory of metals held for BRNA at PSI and purchased by BRNA with commingled funds. (AER at 1:4; 2:60-61; 3:141, 148; 4:292).

Because of the often substantial delay between receiving a "storage" customer's funds and an actual request for metal delivery or account liquidation, BRNA was afforded the opportunity to utilize the cash received from "storage" customers for purposes other than the purchase and storage of precious metals. BRNA and its owner, Alan Saxon, took advantage of that opportunity. (AER at 3:103, 108-22). In fact, the precious metals in BRNA's inventory represented only a tiny fraction of those needed to satisfy the claims of all "storage" customers.

Had BRNA used the funds received from "metal storage" customers to purchase and store metals for their accounts, then, according to the company's records, BRNA would have held in storage for the accounts of the thousands of

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[8] Although Petitioner alleges that he "purchased" bullion in 1981 and 1982, the uncontroverted fact is that although he conveyed money to BRNA for the purchase of bullion, BRNA never purchased or stored bullion for Petitioner. Petitioner simply received metal out of BRNA's inventory in August 1983 — months after he made his payments to BRNA. Petitioner cites to no evidence in the record to support his contrary assertion that he ". . . made purchases of bullion" (Petition at 5), because there is none.

program participants over $50 million worth of precious metals when BRNA filed its bankruptcy petition on October 3, 1983. In contrast, BRNA never had in its account at PSI more than $3 million worth of precious metals, and on October 3, 1983 there was less than $1 million worth of precious metals in BRNA's account. (AER at 3:148, 174).

So long as BRNA avoided a panicked request for liquidations, new customer funds were available to finance existing customer liquidations. When BRNA was confronted with increased requests for liquidation, and a decrease in new customer accounts, it was no longer able to hide the losses it had suffered in its commodities trading. (AER at 1:4; 2:61; 3:103, 108-122). As a result, this bankruptcy case was commenced.

In Petitioner's case, he paid BRNA to purchase metals for him at various times. The last such payment occurred in June 1983. (AER at 1:4, 6). As previously explained, however, BRNA did not purchase or store metals for Petitioner, and no metals were transferred to his account until August 22, 1983.

Petitioner claims that, unlike the other "metal storage" customers, BRNA actually purchased and stored metal for him. Petition at 5-6, 22. This bald assertion is unsupported by any admissible evidence in the record; the only "evidence" which Petitioner adduces is Petitioner's declaration as to what he claims he was told in conversations with Patrick Lynch of PSI. However, Petitioner's declaration as to Mr. Lynch's out-of-court statements to him was properly stricken from the record as inadmissible hearsay (BRT 14:15-15:16; AER at 13:426-28; *see* Fed. R. Evid. 801(c)), in a ruling which is not challenged on appeal. Thus, there is *no* admissible evidence in the record to support Petitioner's repeated assertion that BRNA actually purchased and stored metal separately for him at any time prior to the transfer of metal to Petitioner's account in August 1983.

In August of 1983, and after learning of BRNA's financial problems, Petitioner directed BRNA to transfer bullion to

Petitioner's own account at PSI. (AER at 10:394, 396-97). As a result of Petitioner's instructions, on August 22, 1983, BRNA caused 14,950 ounces of silver, 12 ounces of gold, and 39 ounces of platinum to be transferred out of its inventory of metals maintained at PSI to PSI which, in turn, then *first* began to hold the metals for Petitioner under a direct storage contract. (ER at 4:76-77; AER at 1:4, 5; 3:286; 6:341-45; 10:394-97).

SUMMARY OF ARGUMENT

The salient characteristic of the record below is that there was *no probative evidence to counter the Trustee's evidence as to the manner in which BRNA conducted its business.* The Trustee's evidence established that the funds received from Petitioner were immediately commingled with BRNA's other sources of cash; that BRNA did not then purchase any metals specifically for Petitioner or hold any metals in Petitioner's name; that BRNA purchased metals with its commingled funds; that such metals were stored by PSI for BRNA's account; that BRNA was insolvent at the time of the transfer of bullion out of its inventory to Petitioner; and that BRNA's creditors will not receive 100 cents on the dollar. Thus, the issues in this case are not factual issues at all, but legal issues regarding the application of law to uncontroverted facts.

In petitioning this Court for a writ of certiorari, Petitioner asserts no special and important reasons for this Court to exercise its discretion and grant the relief requested. Petitioner has failed to satisfy his burden of establishing a basis for certiorari. Instead of arguing why appellate review by this Court is justified, Petitioner simply raises various legal issues. These legal issues were raised and fully briefed to the courts below and were rejected by those courts.

In essence, Petitioner raises four basic legal issues. First, Petitioner argues that the Trustee did not establish that the metal transferred to Petitioner was "property of the debtor." Petitioner's argument is flawed because it is based upon the factually unsupported allegation that BRNA had purchased

metals for him. The uncontroverted facts are to the contrary and establish that, substantially after he paid BRNA, BRNA transferred metals to an account for Petitioner at PSI *from BRNA's inventory of metals, which BRNA purchased with commingled funds.* The conclusion that the metals transferred were property of BRNA is supported by ample nonconflicting case law. Insofar as Petitioner asserts that the metal conveyed to him was held in trust for him, Petitioner presented no evidence tracing the funds which he originally paid to BRNA into the property transferred to PSI for Petitioner many months later; and controlling federal and state authority establishes that a party asserting a "trust" claim to property held by a bankrupt has the affirmative burden of tracing the property conveyed by the claimant into the specific property to which the claimant asserts a "trust" claim.

Second, Petitioner claims that he was not a "creditor" of BRNA when the bullion was transferred to him, and that there was no "antecedent debt" to him at the time of the transfer, on the bases that: (1) he was never a creditor, because BRNA never breached its contract with him; and (2) at most, he became a creditor only when he made demand for the delivery of metal in August 1983. Neither premise is correct. Under the broad definition of "claim" contained in 11 U.S.C. § 101(4) and applied by all courts including this Court, which includes contingent, unliquidated and unmatured claims, Petitioner first became a creditor of BRNA when he paid BRNA to purchase and store bullion for him.

Third, Petitioner contends that he had only a burden of production, as opposed to the burden of proof, on his asserted affirmative defenses. Petitioner is incorrect as a matter of law. Moreover, Petitioner did not introduce any evidence even to satisfy his claimed burden of production.

Finally, Petitioner argues that the courts below erred in concluding as a matter of law that the "ordinary course of business" defense of 11 U.S.C. § 547(c)(2) does not apply in this case. However, the nonconflicting case law establishes

that section 547(c)(2) was intended only to apply to ordinary trade credit transactions, and not to transfers made in connection with the massive wrongdoing perpetrated on thousands of customers as in BRNA's "metal storage" program.

As evidenced by Petitioner's own arguments, and as more fully discussed below, none of the "character of reasons" justifying this Court's appellate review is asserted or applicable. The decision below is supported by established non-conflicting case law. Furthermore, the decision does not conflict with any California state court decisions, there was no breach of accepted judicial procedures and, most importantly, there is no important federal law issue which this Court must decide.

In short, Petitioner's petition for a writ of certiorari should be denied.

ARGUMENT

I. There Are No Special and Important Reasons Compelling Review on a Writ of Certiorari.

This Court's appellate review on a writ of certiorari is discretionary. Petitioner is not entitled to appellate review by this Court on a writ of certiorari as a matter of right. Rules of the Supreme Court of the United States, Rule 17.1. *Fay v. Noia,* 372 U.S. 391 (1963).

It is incumbent upon Petitioner, as a petitioner seeking a writ of certiorari, to establish "special and important reasons" for this Court's grant of review. Rule 17.1 of the Rules of the Supreme Court of the United States delineates the "character of reasons that will be considered" by this Court in deciding whether to issue a writ of certiorari. Petitioner has failed to satisfy this obligation. In fact, Petitioner has not even attempted to meet his burden. The petition is nothing more than a preliminary brief on the merits, and in that regard it does not present any basis to reverse the decision below. Moreover, none of the reasons generally justifying a grant of certiorari are present.

II. The Ninth Circuit's Decision Does Not Conflict with Other Decisions of Any Federal Court of Appeals or Decisions of this Court.

The legal issues raised by the Trustee's preference action are neither novel nor complex. The Bankruptcy Court for the Central District of California, the District Court for the Central District of California, and the Court of Appeals for the Ninth Circuit each applied the governing law to the facts as established by the uncontested evidence and found in favor of Respondent. The governing law is well established by the case law. In fact, the Ninth Circuit's decision on the legal issues which Petitioner seeks this Court to review is supported by, and does not conflict with, decisions of any Court of Appeals or this Court.

(1) Property of the Estate.

(a) Metals Held by BRNA in its Own Name and Purchased with Commingled Funds Are Presumptively BRNA's Property.

Based upon the uncontroverted evidence introduced by the Trustee, the Bankruptcy Court found that within the 90-day preference period BRNA transferred metals from its account at PSI to Petitioner's account at PSI. The Bankruptcy Court also found upon the uncontroverted evidence that BRNA maintained a minimal perpetual inventory of metals which it used to satisfy a customer's request, and that the metals which were purchased to maintain the inventory were purchased with commingled funds. Based upon these findings, all the courts below concluded that as a matter of law Respondent met his burden of proving that the metals so transferred were property of BRNA.

This conclusion is supported by ample nonconflicting case law. *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1355-56 (5th Cir. 1986) (debtor has an interest in property under section 547 if the transfer diminishes the bankruptcy estate); *Georgia Pacific Corp. v. Sigma Serv. Corp.*, 712 F.2d 962, 968 (5th Cir. 1983) (funds potentially

impressed with a constructive trust were property of the estate; debtor has sufficient "legal" interest in the funds); *Henderson v. Allred (In re Western World Funding, Inc.)*, 54 Bankr. 470, 475 (Bankr. D. Nev. 1985) (fact that transfers at issue were evidenced by checks drawn on bank accounts of the debtors and honored by the drawee banks constituted "*prima facie* proof that these defendants received transfers of the debtors' property"); *Merrill v. Abbott (In re Independent Clearing House Co.)*, 41 Bankr. 985, 1010-11 (Bankr. D. Utah 1984), *aff'd in part, rev'd in part*, 62 Bankr. 118 (D. Utah 1986) ("Generally, a transfer of property of the debtor, within the meaning of Section 547(b), occurs whenever there is a giving or conveying of anything of value which has debt-paying or debt-securing power.").

Petitioner does not argue that this conclusion conflicts with other existing case law. Instead, Petitioner simply argues that the conclusion is not supported by the cited authorities. Petitioner's argument is without merit.

The Fifth Circuit decision in *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351 (5th Cir. 1986) , supports the Ninth Circuit's decision. In *Coral Petroleum*, the creditors' committee brought a preference action to recover a loan repayment made to the debtor's lenders. The Fifth Circuit held that the repayment was not an avoidable preference because the property transferred was property of a third party; the debtor had no control over the property transferred. In contrast, here the metals transferred were held by BRNA in its name and purchased by BRNA with its commingled funds. By reason of the transfer from BRNA to Petitioner, BRNA's assets were diminished.

The decision in *Henderson v. Allred (In re Western World Funding, Inc.)*, 54 Bankr. 470 (Bankr. D. Nev. 1985), similarly supports the decision of the courts below. BRNA's transfer of metals held in its own account and purchased with commingled funds is legally indistinguishable from a

delivery of a check drawn on a debtor's account (the property transferred in *Western World*). In both instances the property transferred was held by the debtor in its own name immediately prior to the transfer.

(b) BRNA Never Held Property for Petitioner Pursuant to an Express Trust.

Petitioner argues that the Ninth Circuit erred in concluding that the metals transferred were property of BRNA because: (1) a genuine issue of fact existed as to the creation of an express trust; and (2) the Ninth Circuit erroneously placed on Petitioner the burden of tracing a trust *res*.

To support the creation of an express trust, Petitioner relies solely on BRNA's advertising brochure. The only reference to a trust in the brochure is that Intermountain Depository Corporation would be a trustee for participants' bullion stored at PSI.[9] There is nothing in the record which indicates that BRNA agreed to be a trustee for the funds it received from Petitioner. And, in fact, BRNA took Petitioner's funds, commingled them with other funds and used the funds for its own purposes. BRNA, by its conduct, never intended to be a trustee, and no metal was purchased for Petitioner which would constitute a trust *res*. Accordingly, no trust ever was created.

Moreover, in order to impose a trust on property held by BRNA, it is well established as a matter of federal law that a claimed beneficiary of the trust seeking to enforce the trust in a bankruptcy case must trace his property to the alleged trust *res*. *Schuyler v. Littlefield*, 232 U.S. 707 (1914) (claimant from whom brokerage firm fraudulently obtained shares of stock had burden of tracing stock proceeds into hands of the bankruptcy trustee); *Cunningham v. Brown*, 265 U.S. 1, 1011 (1924) (preference defendants who claimed that the bankrupt's payments to them constituted the return of their

[9] Petitioner asserts that the brochure states that the funds received would be held in trust by Intermountain Depository Corporation, and cites to the brochure. There is no language in the brochure supporting this assertion.

own money, and not a preference, had the burden of tracing the money they had previously transferred to the bankrupt to the money which they subsequently received out of the bankrupt's bank account, even though the bulk of the bankrupt's funds were obtained by fraud); *In re Morales Travel Agency*, 667 F.2d 1069, 1074 (1st Cir. 1981) ("[T]he doctrine of tracing requires the claimant to identify the property he seeks as his own, *not just to exclude the possibility that it belongs to the debtor.*") (emphasis added); *Rosenberg v. Collins*, 624 F.2d 659 (5th Cir. 1980) (customers of commodities investments business sued in a fraudulent conveyance action to recover pre-bankruptcy transfers had the burden to "trace the identity of [their] property"); *Elliott v. Bumb*, 356 F.2d 749, 754 (9th Cir.), *cert. denied*, 385 U.S. 829, (1966) (notwithstanding otherwise applicable state law, alleged trust beneficiary has the burden of identifying a trust *res* in order to enforce a trust in bankruptcy); *Walser v. Int'l Union Bank*, 21 F.2d 294, 298 (2d Cir. 1927) (restitution of money misappropriated from bank constituted voidable preference to bank where no effort was made to trace the misappropriated funds into the jewelry sold to raise the sum repaid to the bank).

Petitioner submitted no evidence to support this tracing requirement. In fact, the evidence submitted by the Trustee conclusively established that Petitioner could not trace the funds he delivered to BRNA to the metals BRNA transferred to him.

(c) Creditor and Antecedent Debt.

Petitioner does not contest the proposition that "claim" and "debt" are defined broadly under the Bankruptcy Code. The proposition is well established. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 309, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6266; S. Rep. No. 989, 95th Cong. 2d Sess. 21, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5808; *see also Ohio v. Kovacs*, 469 U.S. 274, 279 (1985); *Kallen v. Litas*, 47 Bankr. 977, 982-83 (N.D. Ill. 1985).

Again, instead of pointing to a conflict in the law which this Court should resolve, Petitioner argues the merits of his position. Petitioner argues that he was not a creditor and BRNA was not liable on a debt to him because:

> Mr. Bozek purchased the metal months in advance of the preference period. Mr. Bozek did not have a "claim" or "debt" owed to him, he had title to precious metals stored in P.S.I.'s facility which were later delivered to his separate P.S.I. account during the preference period. The only change of legal significance is that Mr. Bozek now had full *custody* of his metals.

Petition at 22. There is absolutely nothing in the record to support this assertion. Rather, the uncontroverted evidence shows that BRNA never purchased metals for Petitioner and, instead, commingled Petitioner's money with other funds and used the funds for BRNA's own purposes.[10]

(d) Exceptions to Section 547(b).

Petitioner's last two arguments also address the merits of the issues raised as opposed to establishing a basis for granting a writ of certiorari. Again, Petitioner's arguments miss the mark.

Petitioner first argues that the Ninth Circuit erroneously placed on Petitioner the burden of proving the affirmative defenses raised by Petitioner. However, the Ninth Circuit's position is supported by relevant, nonconflicting case law. *Production Steel, Inc. v. Sumitomo Corp. of America (In re Production Steel, Inc.)*, 54 Bankr. 417 (Bankr. M.D. Tenn. 1985) (summary judgment entered in favor of debtor where creditor failed to meet his burden of establishing his defense under 11 U.S.C. § 547(c)(2)); *In re American Ambulance*

[10] "Bozek claims that he received bullion at Perpetual Storage Incorporated at the time that he delivered funds to BRNA. However, the record indicates BRNA did not buy and store metal for Bozek upon receiving his money. Rather, BRNA comingled [sic] Bozek's money with that of other customers and purchased bullion for storage in very small amounts. Therefore, it cannot be said that BRNA purchased bullion for any particular customer." 836 F.2d at 1219 n.7.

Service, Inc., 46 Bankr. 658, 660 (Bankr. S.D. Cal. 1985). *Cf.* 11 U.S.C. § 547(g) (West Supp. 1987).[11]

Petitioner also argues that the Ninth Circuit erred in concluding that the ordinary course of business defense does not apply as a matter of law. Petitioner argues that the Ninth Circuit held that BRNA was involved in a Ponzi scheme and a transfer of property made in connection with a Ponzi scheme is not made in the ordinary course of business. Accordingly, Petitioner attempts to distinguish the original Ponzi scheme from the facts of this case. Petitioner's argument is irrelevant.

The Ninth Circuit did not conclude that BRNA was involved in a Ponzi scheme. Rather, the Ninth Circuit concluded that an ordinary course of business defense only applies "to transfers by legitimate business enterprises" and concluded that "BRNA was [engaged in] a fraudulent business" 836 F.2d at 261. The Ninth Circuit did not conclude that BRNA was engaged in a Ponzi-like scheme.

The restriction of the ordinary course of business defense to legitimate business enterprises is well established. S.R. No. 95-989, 95th Cong., 2d Sess. 88 (1978); H.R. No. 95-595, 95th Cong., 1st Sess. 373 (1977) ("The purpose of this exception is to leave undisturbed normal financial relations . . ."). *Graulty v. Brooks (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.)*, 819 F.2d 214 (9th Cir. 1987) (transfers made in connection with a Ponzi scheme not within the "ordinary course of business"); *Marathon Oil Co. v. Flatau (In re Craig Oil Co.)*, 785 F.2d 1563, 1567 (11th Cir. 1986) (ordinary course of business exception "is directed primarily to ordinary trade credit transactions"); *Barash v. Public Finance Corp.*, 658 F.2d 504, 511 (7th Cir. 1981) (idem.).

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[11] Even if Petitioner is correct that the applicable burden is a burden of production only, Petitioner did not submit evidence establishing a "contemporaneous exchange" or "ordinary course of business" defense.

III. The Other "Character of Reasons" Delineated in This Court's Rules for Issuing a Writ of Certiorari Are Not Applicable.

In petitioning this Court for a writ of certiorari, Petitioner does not assert any of the following grounds also usually relied upon by this Court in determining whether to grant certiorari:

> (a) When a federal court of appeals . . . has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court . . .

Rules of the Supreme Court of the United States, Rule 17.1(a) & (c). The reason for this omission is that none of these reasons for granting certiorari applies.

With respect to potential conflicts with state court decisions, the legal issues raised by Petitioner are in the main federal questions arising exclusively under the Bankruptcy Code. The only legal issue arguably involving California law is the creation of an express trust. *Toys "R" Us, Inc. v. Esgro, Inc. (In re Esgro, Inc.)*, 645 F.2d 794, 797 (9th Cir. 1981) (creation of a trust is an issue of state law). *But cf., Elliott v. Bumb*, 356 F.2d 749 (9th Cir.), *cert. denied*, 385 U.S. 829 (1966) (a trust beneficiary has the burden of identifying a trust *res* in order to enforce a trust in bankruptcy, notwithstanding applicable state law). On the issue of creating a trust, California law does not conflict with the decision in this case that Petitioner has the burden of identifying a trust *res*.

As a matter of California law, judicial enforcement of an express trust requires identification of the trust *res*. *Gonsalves v. Hodgson*, 38 C.2d 91, 98 (1951); *Corley v. Hennessy*, 58 Cal. App.2d 883, 885 (1943). Even where a trustee wrongfully commingles trust property, the burden of identifying a trust *res* remains with the trust beneficiary. *Kobida v. Hinkelmann*, 53 Cal. App.2d 186, 195 (1942); *Blackhurst v. Westerfeld*, 111 Cal. App. 548, 554 (1931).

On the issue of the nature of the judicial proceedings below, Petitioner does not suggest, nor is there anything in the record to substantiate a suggestion, that there was any departure from the normal and accepted course of proceedings.

Finally, there is no overriding question of law which this Court must decide. The Trustee's preference action is neither novel nor complex. The facts are established by the uncontroverted evidence. More importantly, as discussed above, the issues involved are the subject of nonconflicting decisions.

CONCLUSION

For the reasons and based on the authorities presented above, Petitioner's petition should be denied.

Respectfully submitted,

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May 11, 1988